IN THE SUPREME COURT OF THE UNITED STATES

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MISSOURI, :

Petitioner :

v. : No. 10-444

GALIN E. FRYE :

- x

Washington, D.C.

Monday, October 31, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

CHRIS KOSTER, ESQ., Attorney General, Jefferson City, Missouri; on behalf of Petitioner.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

EMMETT D. QUEENER, ESQ., Assistant Public Defender, Columbia, Missouri; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 10-444, Missouri v. Frye.

General Koster.

ORAL ARGUMENT OF CHRIS KOSTER

ON BEHALF OF THE PETITIONER

MR. KOSTER: Mr. Chief Justice, and may it please the Court:

But for counsel's error, defendant would have insisted on going to trial. That is the test for prejudice. But in Mr. Frye's case, that test was not met. The truth is, despite counsel's error, Mr. Frye knowingly waived his right to trial, and solemnly admitted his guilt. Under both Hill and Premo, Mr. Frye has failed to show prejudice, and therefore his guilty plea remains voluntary, intelligent, and final.

Mr. Frye may not assert ineffective assistance by alleging that, but for counsel's error, he could have gotten a better deal on an earlier date. That is not the standard. And the court of appeals should be reversed.

JUSTICE SOTOMAYOR: Counsel, sometimes one's experience has to be challenged. I for one have never heard of a case in which parties are discussing a plea,

except in the most unusual of circumstances, and they advance a court date to enter the plea. In most cases, they just wait until the court date and tell the judge: I'm ready to plead guilty.

This is such an unusual case, because the plea happens on day 1. The courts below is assuming that between day 1 and day 5, or 3 or 4, the guy would have come in and pled guilty, would have advanced the later court date?

MR. KOSTER: Well, the plea -- the plea occurred on March 3, 2008 --

JUSTICE SOTOMAYOR: No, that's the second plea.

MR. KOSTER: It went -- right. The plea offer --

JUSTICE SOTOMAYOR: I'm talking about the plea --

MR. KOSTER: The plea offer expired on December 28, 2007, I believe.

JUSTICE SOTOMAYOR: He commits the crime on the 29th or the 30th. He commits a second offense on the 29th or 30th?

MR. KOSTER: That actually was the fifth offense, but yes.

JUSTICE SOTOMAYOR: All right. My -- my

point is, how reasonable could it be for the -- for a court to assume that the plea offer had been made and that he would have taken it before the January court date that was set?

MR. KOSTER: It would be less than likely, but not impossible, I would say. And it would depend on a myriad of circumstances, many of which are as -- as -- could be just dependent on the defense counsel's own personal schedule.

But the scheduling of a plea once -- once an agreement has been made between a prosecutor and a defense counsel, the scheduling of a plea I think is largely a basis of convenience and does not necessarily -- is not necessarily based on the preliminary hearing date or any future schedule date.

CHIEF JUSTICE ROBERTS: I suppose the defendant might think, you know, there is really bad evidence out there that they don't have yet. And if I -- I want to nail this deal down as soon as possible. I mean, that would be a reason to -- to move things up and get the plea in early, wouldn't it?

MR. KOSTER: It could be. I would say that that is --

CHIEF JUSTICE ROBERTS: I mean, I don't know how often that happens.

MR. KOSTER: That is possible. Right. But it's also exactly another reason to keep the discretion of offering these plea bargains, and the ability to take these plea bargains back solely in the hands of the prosecutors in the country.

JUSTICE ALITO: I am really puzzled by what as a practical matter is at stake in this case. Under the State court decision, the defendant has the option of either pleading guilty to the charge -- in which case he will be right back where he is now -- or he can insist on a trial.

If he insists on the trial, you need to prove that he was driving with a revoked license. That seems to me -- if there ever was a slam dunk trial, that seems to me that's the slam dunk trial. You introduce the records of -- showing that his license was revoked, and you have the officer testify that on such and such a date, he was driving. So I -- I don't really see what is involved in this case.

MR. KOSTER: The last part of the question is?

JUSTICE ALITO: I don't see what is at stake here. I don't see what that -- as a practical matter, this seems to be -- to me a case about nothing.

Am I wrong? Am I missing something?

MR. KOSTER: As a former -- as a former prosecutor myself, I would agree with this. This gentleman went into court. He had two options before him. There was not a third option. The -- the plea that was -- that left reality on December 28 was not there on March 3. He had a binary choice between two options on March 3. He chose not trial. By choosing not trial, it leaves us without a situation where either Hill or Premo prejudice can be shown.

JUSTICE KENNEDY: But we take the case on the assumption that he hadn't heard of the earlier better offer. Am I wrong about that?

MR. KOSTER: In this case, the defendant was unaware of the earlier better offer. That is correct. But in this case also, the defendant went out 2 days later and picked up a fifth charge. So one of the considerations that I think has to be left with the Court is that the possibility that this particular defendant was ever going to see this plea offer is almost nil. This was his fifth arrest for driving while revoked.

JUSTICE BREYER: I mean, we've got to be -- aren't we taking this on -- isn't there an assumption that there is a finding, or some lower court judge made a finding that if he had known about the better deal

that was offered, he would have taken it?

MR. KOSTER: That -- what is in the record is that he would have taken the 90-day deal on the misdemeanor.

JUSTICE BREYER: Yes.

MR. KOSTER: But there is also an important element in the record, that when he went in front of the court on March 3 and the felony offer was given to the judge, which was 3 years in deferral on probation plus 10 days shock time, the judge in Columbia, Missouri, gave the felony offer the back of his hand.

And so while, yes, the record says that --

JUSTICE BREYER: So that's a causal problem. You are saying that, even if he had accepted it, it would have gone to the judge, and the judge would have turned it down anyway, the judge wouldn't have accepted it.

MR. KOSTER: If the judge --

JUSTICE BREYER: Is that your point?

MR. KOSTER: Yes, Your Honor.

JUSTICE BREYER: Well, then there's a -- somebody must have found somewhere that this made a difference, that the failure to tell him about the special offer of the misdemeanor did in fact make a difference because he would have accepted it and he

would have ended up with it.

MR. KOSTER: Well, and that is the problem that brings us here today. The Missouri Court of Appeals said that --

JUSTICE BREYER: Yes.

MR. KOSTER: Through a misrepresent -- a misinterpretation, we believe, of the Strickland standard and, more importantly, a misreading of where Hill and Premo takes us. Cert was granted on this case just at the same time that Premo was very clearly re-articulating the Hill standard.

And so the court of appeals had gone back towards Strickland with a very broad reading just as this Court was coming down with an opinion that very clearly re-articulated the Hill standard, the two-part performance and prejudice test.

And that's what we are asking be reversed.

JUSTICE ALITO: Suppose he had snapped up this deal as soon as it was offered. By the time he -- he appeared before the court to answer a formal plea of guilty, would the court have known that he had in the interim been arrested yet again for driving without a license?

MR. KOSTER: The court probably would have known as a result of a pre-sentence investigation. And

perhaps more importantly, Your Honor, the prosecutor himself would have known about the -- the second arrest, and he would have withdrawn it.

And if I may, it's not always -- we have concentrated so far in the case before and today on subsequent criminal actions. You know, back home in Missouri, the criminal reporting system, we still use on five- part carbon paper that you have got to press hard with a pen to get down to the fifth page. It is also possible that the prosecutor learns at a subsequent date of a criminal history that is material that predates the plea offer. And so in both directions, it's important that prosecutors have full discretion to take these pleas back.

JUSTICE KENNEDY: Well, regardless, your legal position is that there is no basis for setting aside the plea if an earlier, better offer was not communicated.

That's your legal position, right?

MR. KOSTER: My legal position is that a finding -- a conviction was entered on March 3. He pled guilty. The question before the Court is what satisfies a standard by which we are going to unwind it? A Sixth Amendment violation would satisfy that standard, and if -- if there was a Sixth Amendment violation, if the plea

was truly involuntary, we would unwind it.

But the search for a better deal that is antecedent to the events of March 3 is not the Sixth Amendment violation that should begin unwinding 97 percent of the convictions in the country.

JUSTICE KENNEDY: You're saying there's no Sixth Amendment violation when the counsel fails to communicate a favorable offer to the defendant. That's your position.

MR. KOSTER: No. Respectfully, Your Honor, that is not my position. My position is that ineffective assistance is a two-part test, that there was a performance breach in the failure to communicate, but once the performance breach is accepted, then it has to be run through the Hill standard to find whether prejudice has occurred, and then we would find the Sixth Amendment breach. But we -- we do not get there logically because the offer did not exist after -- after December 28.

JUSTICE SCALIA: Well, I -- I didn't understand that to be your position.

There -- there is a statement in your brief that the question is whether plea negotiations that did not result in a guilty plea constitute a critical confrontation that gives the rise to effective

assistance of counsel during such negotiations. So I thought your position was that so long as the -- the plea negotiations don't result in a guilty plea, effective assistance of counsel doesn't even come into the equation.

MR. KOSTER: I -- there is a question in --

JUSTICE SCALIA: I mean, you can say yes or no. I mean, you can retract the question on that, I suppose.

MR. KOSTER: Is the question whether I believe that plea negotiations are a critical stage?

JUSTICE SCALIA: When they do not result in a guilty plea.

MR. KOSTER: I believe they are not -- I believe that plea negotiations are not a critical stage under the laws of this Court.

JUSTICE KENNEDY: That's what we took the case for. We didn't -- we wouldn't have taken the case if we were concerned about what happened in March and what happened in February. We took the case because of your position, which is it's not a Sixth Amendment violation in these circumstances.

MR. KOSTER: I do not -- there is a factual question as to whether or not plea negotiations in this case really ever engaged when all that ever occurred was

the prosecutor sent a letter to the defense attorney.

Only in the most technical of readings --

JUSTICE SCALIA: Yes, but we don't care about that. What do we care about that? We -- we don't take cases to figure out those -- those picky, picky factual questions. The issue that I thought was important here is whether this is a critical stage when -- when the defendant is not -- does not accept the -- the plea and plead guilty.

MR. KOSTER: Plea negotiations I don't believe are a critical stage, because the fate -- in the back and forth between a prosecutor and a defense attorney the fate of the accused is not -- is not set. And these -- of course these negotiations can take place over a very long time. Either party can get up from the table and walk away at any time. And then, perhaps most importantly, the -- the dialogue of the negotiations are not used against the defendant at critical stages, which would contrast it, I suppose, in a Miranda situation in a custodial interrogation where that would be a critical stage.

JUSTICE SCALIA: And if it were a critical stage, I suppose that counsel would be ineffective, not only if he was a lousy lawyer and didn't know the law, but if he was a bad negotiator. I mean -- right? Being

a good criminal lawyer means you -- you got to be a good horse trader, right?

MR. KOSTER: I agree that that would be one of the extensions, if critical stage analysis was applied to plea negotiations.

JUSTICE SCALIA: You tell him to turn down a deal that in fact, you know, was a pretty good deal, that would be ineffective assistance of counsel. So you must -- you must know how to handle yourself in a used car lot, right?

MR. KOSTER: I understand that that would be one of the ramifications.

JUSTICE KAGAN: So Mr. Koster --

JUSTICE BREYER: This is on the basic question --

JUSTICE KENNEDY: It's -- it's very odd for you to say that -- to me -- that this is not a critical stage. If it results in a guilty plea and the -- and the attorney has not done sufficient research to uncover a defense, it can be set aside then. So it's -- so you are saying it's not a critical stage depending on what the end result is. That's very difficult.

I thought we were going to tell attorneys, you have an obligation during this plea bargain process to use professional competence. And you say, well, you

do or you don't. That doesn't make much sense.

MR. KOSTER: My understanding, Your Honor, is that attorneys are guaranteed the accused at critical stages, such as arraignments, plea hearings, trials, but then there is an implied guarantee that comes with that critical stage, and that implied guarantee is that their -- that the attorney appointed will do research, analysis and preparation that prepares him for the critical stage.

But when David Boyce is sitting home on a Saturday night with a file opened in his lap preparing for a case on Monday, that moment is not a critical stage of trial, on a Saturday night in his den, but it prepares for, it is precedent to a critical stage. And the failure to engage in that preparation analysis can lead to performance and prejudice at critical stages, but it itself is not.

JUSTICE BREYER: Well, the -- the question -- I make a counter-assumption. The problem that I -- I have a feeling that I would like you and the others to comment on, is that you are worried deeply about a practical problem, and that the practical problem is that it would be too easy, as just was suggested by the question, to find that the lawyer after the defendant is convicted did a bad job during the plea

negotiation, in which case everybody will get two or three bites at the apple. And one of the reasons for that is every brief has been lifting the standards, particularly in respect to prejudice, from Hill, which was addressing a different question. It was addressing the question of missed -- bad performance by the lawyer at trial. And that is hard to track what the effects are. It isn't that hard to say the trial was unfair, give him a new one.

That won't work here, I don't think. So suppose what we did, instead of saying there was no right, you simply said you have to prove with some certainty, work out a standard, that there really was inadequate assistance during the plea bargaining, and you have to show something more than a reasonable probability that this would have led to the plea, et cetera. You have to show that it would have happened.

Or you have a -- in other words, you have two tougher standards for this area, but you don't reject the idea of inadequate assistance of counsel during the plea bargaining stage. I would like people's views insofar as they are willing to give them, on that question.

MR. KOSTER: Ineffective assistance of counsel is a -- is a term of art, and it is a two-part

test. I believe that there can be performance breaches that occur between -- at the -- at the plea bargaining stage, but that prejudice does not occur until we return to a critical stage, which is -- is when that -- when that plea, when the product of that plea negotiation is returned to a critical stage and then it has critical stage protections over it, where the judge is there and there is an allocution and the rest of the protections --

JUSTICE GINSBURG: Well, the open plea that wasn't made, that is a critical stage, that he took a the plea. But he I think has a plausible argument that the plea he made, the open plea with no bargain in the picture, that that plea was not intelligently made because he didn't know that there had been an offer for him to plead to a misdemeanor rather than a felony.

MR. KOSTER: In Tollett -- may I?

JUSTICE GINSBURG: Yes.

MR. KOSTER: In Tollett v. Henderson the question of the defendant Mr. Henderson's knowing waiver in that case, where the breach was infinitely more egregious in my view, which was the 1948 court packing that occurred and the African Americans citizens were excluded from that grand jury pool.

Mr. Henderson's lack of knowledge about a

previous constitutional deprivation was not -- did not make his waiver unknowing. Same with the analysis in McMann and in Parker and in Brady. To -- to say -- there is no limiting principle that will allow this omission to unwind the knowing quality of Mr. Frye's waiver and then not open up the floodgates to all sorts of pre-constitutional deprivations.

I would like to reserve the balance of my time, Your Honor, thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Yang.

ORAL ARGUMENT OF ANTHONY A. YANG

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. YANG: Mr. Chief Justice, and may it please the Court:

When a defendant pleads guilty --

JUSTICE SOTOMAYOR: Are you taking the same position your -- I don't want to call it co-counsel -- Petitioner's counsel is taking, that you are not entitled to an attorney at plea bargaining, unless you waive your -- unless your right to a trial?

MR. YANG: No, we are not --

JUSTICE SOTOMAYOR: It's not a --

MR. YANG: We are not taking the view. In

this case the alleged deficiency is really not an interaction between the prosecution and the defense counsel in plea bargaining. The alleged deficiency is a failure to inform the defendant of things the defendant would want to know as going forward, and we're -- we are willing to assume the defendant has a right to be properly informed by counsel. But with any Strickland claim the relevant inquiry is whether or not the defendant has shown cognizable prejudice as a result of a deficient performance by the counsel.

And when a defendant pleads guilty in open court, the conviction rests on the defendant's assertion, an admission of his own guilt, and his consent that there be judgment entered, a judgment of conviction, entered without trial.

And because the conviction rests on a consent judgment, it wipes free antecedent constitutional errors. The one challenge that --

JUSTICE KAGAN: So I think, Mr. Yang, what Justice Sotomayor was suggesting is that your position does in fact require you to say that if there were no counsel at all in the proceedings, that would be perfectly -- that -- you know, there would not be a constitutional problem with that. Once he pleads guilty, it just wipes away the fact that no counsel has

been appointed for him.

MR. YANG: A -- a guilty plea wipes free all kinds of constitutional violations.

JUSTICE SCALIA: No, but the -- the guilty -- I mean, no, the reason why that is not true is that the guilty plea must be entered with advice of counsel. You acknowledge that, don't you?

MR. YANG: Correct. And the guilty plea --

JUSTICE SCALIA: So the guilty plea doesn't erase everything if it has been entered without advice of counsel.

MR. YANG: Correct. When the counseled guilty plea is entered, this Court has held that the one remaining challenge that would be allowed is the challenge to the knowing and intelligent waiver of the right to trial, which is what the guilty plea is. Now, in order to show that you are prejudiced --

JUSTICE KAGAN: So does that mean, Mr. Yang, a State could set up a system where it says we are going to do all our negotiating with the defendant with no counsel present in the room, but we are going to keep a lawyer on board just in the courtroom to advise him whether he should plead -- to advise him about the plea that he struck, even though he struck this plea with no counsel in the room, and that would be perfectly okay?

MR. YANG: We are not saying that -- that --

JUSTICE KAGAN: All the negotiations could be uncounseled.

MR. YANG: We are not taking the position that States can deprive counsel or deprive counsel from participation in the guilty plea process. But what we are saying --

JUSTICE KAGAN: Well, I don't understand how you can say that, if you -- you know -- you are saying that; because you're saying that in the end the guilty plea wipes all constitutional error away.

MR. YANG: Just as we are not saying that there can be coerced confessions, not just like we are saying that a statute can impermissibly burden the right to trial by putting a death sentence on -- that's available only when you go to trial. We are not saying any of that is allowed. But what we are saying is when a -- and that was the Brady trilogy, Brady and McMann and ultimate Tollett, which led to Hill.

What the Court recognized is when you plead guilty in open court you are waiving your right to trial. And the relevant inquiry, the only inquire once the defendant has admitted guilt, is to determine whether or not the waiver of the trial rights were knowing and voluntary. And the reason that that is a

relevant inquiry is because you have a constitutional right to trial. And due process requires that the waiver of those trial rights be knowing, intelligent and voluntary. And in Hill, the Court confronted the question and said: You need to show deficient advice in the context of pleading guilty; and in addition, you had need to show that that prejudiced you because, absent -- if you had received proper advice, you would have actually not waived your right to trial; you would have asserted your right to trial and gone to trial. That's the standard that applies.

JUSTICE KENNEDY: If defense counsel gives wrong information to the defendant about witnesses that can testify in his behalf, and so forth, very bad legal advice, that can be grounds for setting aside the plea, correct?

MR. YANG: It can, and because what's relevant --

JUSTICE KENNEDY: All right, so -- and that is because counsel pre the entry of the plea did not adequately advise his client.

MR. YANG: Right, right. The key is that --

JUSTICE KENNEDY: Why is there no problem when he doesn't adequately advise a client of earlier better offers?

MR. YANG: It's a different prejudice. The -- when you plead guilty and your counsel has advised you wrongly in a way that would have changed your mind about the merits of going forward on trial, you can show that the waiver of the trial right is something that was prejudiced. But because -- had you known, had you been properly advised, you would have exercised the whole panoply of rights that the Constitution provides one who goes to trial, not only a right to a trial by jury but all the trial rights that go with it.

But when you instead plead guilty in open court -- and the claim here is not that the defendant would have exercised his right to trial. The claim is he would have waived his right to trial either way. That is not prejudice to the -- that would overcome the guilty plea, which again rests on --

JUSTICE KAGAN: Well, Mr. Yang, there are different kinds of unfairness. One kind of unfairness is when you are badly advised and you, therefore, waived your right to trial and you would have gone. But there is another prejudice, which is you and ten other guys are all in the same situation and those ten other guys come up with a favorable plea deal because their lawyers are paying attention, and you come up with an unfavorable plea deal because your lawyer has fallen

asleep. And to the extent that we have an effective assistance right that means something, that unfairness needs to be addressed by it, doesn't it?

MR. YANG: Well, when -- again, once -- whether or not there was a prior error, once you plead guilty, the question is not whether there were other deals on the table, the question is whether that waiver of --

JUSTICE KAGAN: Well, I guess that is the question. Why isn't that the question?

MR. YANG: Well, right, but if it were the question, it would call into -- this Court in, in going back to Brady and then in Boykin, explained that what's -- the relevant question when you enter a guilty plea is whether you have waived your right to trial validly. And, in fact, that has to be spread upon the record. Rule 11(b) has now been modified by this Court to go through the things you have to check to make sure that that waiver of your trial rights are knowing and voluntary.

What we have here is not anything associated with the waiver of trial rights. What really the defendant is claiming is some entitlement be able to take another deal that would not have resulted in trial. But that is not relevant to the waiver of trial rights.

That would be recognizing another type of right. But this Court has repeatedly held that there is no right to a guilty plea, there is no right to plea bargaining, once you have a plea agreement there is no right to enforcement. The only rights that come into play is when that guilty plea is rendered into a judgment. And when you don't get there, but instead you plead guilty and you have waived your right to trial, you have consented to the entry of judgment, and even if you had received better advice you would have consented to the -- you would not have gone forward to trial, you have -- the basis on which the conviction rests remains valid.

JUSTICE SCALIA: You have admitted that you got what you deserved, right?

MR. YANG: Precisely. And this Court in Premo addressed the exact same question. In Premo there was a contention that had counsel done better before by filing a motion to suppress, it would have been in a better position to secure a better plea agreement from the prosecution. But the Court concluded that, no; the relevant inquiry once you have pled guilty is whether or not you would have, if properly advised, insisted on your trial rights and gone to trial. That's the standard set forth in Hill. And the reason --

JUSTICE GINSBURG: Mr. Yang, in your view is there any situation in which a defendant could regain a plea opportunity that he lost due to counsel's conceded inadequacy? And I think it is accepted that not telling him of the plea offer was ineffective representation. Is there any case where the defendant could regain the plea opportunity that he lost?

MR. YANG: If he pleads guilty?

JUSTICE GINSBURG: Yes, if he doesn't seek the trial right.

MR. YANG: I'm sorry, I didn't catch that.

JUSTICE GINSBURG: Yes. If he doesn't want to go to trial and he is going to plead guilty, is there any circumstance where he could regain that lost opportunity?

MR. YANG: If he has pleaded guilty and he validly waived his rights to trial, because he would not have asserted them, then I think under Hill what you have is a defendant who admits guilt, there is no real risk of any kind of error in that determination, and the judgment which must be set aside -- remember, we have to set aside the judgment. The judgment rests on the admission of guilt and the waiver of trial. The judgment cannot be set aside at that point, because this Court has long recognized the special force of finality

with respect to guilty pleas. That is because for several reasons.

First, guilty pleas are an important part of the system, and it would be -- both delay and impair the orderly administration of justice any time we open another avenue to challenge guilty pleas. But, two, once the defendant has stood up in open court and admitted guilt, there is almost no risk of error, and the defendant has gotten the proper sentence and the proper conviction.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. YANG. Thank you.

CHIEF JUSTICE ROBERTS. Mr. Queener.

ORAL ARGUMENT OF EMMETT D. QUEENER

ON BEHALF OF THE RESPONDENT

MR. QUEENER: Mr. Chief Justice and may it please the Court:

Galin Frye entered a plea of guilty to felony driving while revoked and was sentenced to 3 years in prison. His trial lawyer failed to inform him that the prosecutor was willing to allow him to accept a plea offer to a misdemeanor charge and recommend 90 days in jail. Fundamental fairness and reliability of criminal process requires that an attorney provide his client information regarding matters in this case.

JUSTICE SCALIA: Why? Why is it unfair for the law to apply to this individual the punishment he deserved for the crime that he committed? I mean, the object of the system is to put -- is to punish people who commit crimes in a certain degree.

And here he admitted he did the crime and he got the degree of punishment that the law provides. What could be more fair than that?

MR. QUEENER: Fairness includes a whole range of sentencing options, and in this case the prosecutor was making a determination of what was fair in this case when he made the offer.

JUSTICE SCALIA: Ex ante, I suppose you could say that. But when you look at it later, it's clear that that would have been unfair. In fact, this individual was perfectly willing to admit that he had been guilty of more than what the prosecutor had offered.

MR. QUEENER: Part of the consideration that a defendant has to make during the plea bargaining process or plea negotiation process is determining the liability that he's willing to accept in entering a plea of guilty.

JUSTICE SCALIA: That's true, and he did that when he entered the plea of guilty. You do not

contest he was well advised when he entered that plea that it was knowledgeable and he admitted that that's what he had done and was willing to accept the degree of punishment prescribed by law.

MR. QUEENER: Well, he was -- the guilty plea in terms of what he was admitting to, he was willing to and had to agree that he had committed the crime of driving while -- while revoked. But the plea was open in terms of sentencing and he was allowed to argue for something lower than sentencing. He only knew that was the available options at that time.

He wasn't aware that the prosecutor had made available an option to him to limit his exposure for that offense to 90 days.

JUSTICE SOTOMAYOR: Counsel, I have a two-part question.

MR. QUEENER: Okay.

JUSTICE SOTOMAYOR: All right. What exactly made his plea unknowing or involuntary, number one?

And number two, identify the right he was deprived of, substantive or procedural, by his attorney's failure to communicate the plea.

MR. QUEENER: The plea was unknowing and involuntary because he was not made aware by his counsel's unprofessional representation of all of the

circumstances available to him, the consequences of entering that guilty plea, that would have included the 90-day on a misdemeanor if he had been aware of that.

JUSTICE ALITO: Suppose he had been told that -- suppose he had been told that, and the prosecutor said, well, yes, that's true. I made that offer, but it's off the table now. And apparently, this was then off the table. So what good would it have done him to know about something that happened in the past but was no longer available.

MR. QUEENER: This offer was only no longer on the table at the time he entered the plea of guilty, because it had expired. And that was a result of counsel's ineffectiveness in failing to communicate that to him. The lower court, the Court of Appeals, made a finding that this offer was available, and he could have taken advantage of it before it expired. And that was a finding by the court below.

JUSTICE ALITO: I understand that. It may have been unfair, but I don't see why it's involuntary. Because I don't see that -- advising him that he had an option at some point in the past which was no longer available really doesn't have much of a -- doesn't have any bearing on the voluntariness of his plea to a later less-favorable offer.

MR. QUEENER: I -- that's -- it seems to me that that's involuntary in the sense that he didn't know it then. It's not that it's involuntary now because that he knows it. It was involuntary because he didn't know it then.

JUSTICE KENNEDY: Well, suppose -- suppose the case in which a plea offer's made, not communicated, and expires. And then there is a guilty plea here. And he doesn't -- and the defendant enters a -- a guilty plea but doesn't know about the prior offer. Is -- is there injury?

MR. QUEENER: There is -- there is an increase in sentence. And that's the situation here.

JUSTICE KENNEDY: Is -- is the plea involuntary? Pardon me, is it unknowing?

MR. QUEENER: It is --

JUSTICE KENNEDY: And what would he -- what would he have done had he known?

MR. QUEENER: It's unknowing in the sense that he did not know the --

JUSTICE KENNEDY: You mean, judge, I'm really sorry I didn't accept responsibility three months earlier?

MR. QUEENER: What he does -- what's unknowing about that is the potential consequence that

he is choosing in deciding to plead guilty. And if I may, that's the second part of your question. The right that he has is the right to make fundamental decisions -- in his case, one of which is to accept a plea bargain and plead guilty.

JUSTICE SCALIA: Doesn't -- doesn't the rule that the plea offer may be withdrawn at any time by the prosecutor -- indeed even after it has been accepted -- doesn't that well enough establish that there is no right to profit from that plea offer, that there is no constitutional right he's being deprived of, given that the prosecutor can withdraw it even after he accepts it?

MR. QUEENER: That can be with -- excuse me -- that can be withdrawn at any time by the prosecutor, but we're not arguing that there is a right to a particular plea -- a particular plea. He is entitled to the right to make a knowing and voluntary acceptance of a plea, a knowing and voluntary guilty plea, and that requires that he know all of the information. And the record that we have in this case, there is nothing to suggest that that plea would not have gone forward. The mere potentiality for withdrawing the plea --

JUSTICE SCALIA: I -- I had hoped you were making some argument other than the knowing argument,

because as prior discussion has shown, even if he had known, it would have made no difference to whether he had accepted the later plea.

Suppose he had been told, "by the way, there was an earlier plea. It's too late to accept it now. Do you want to take this plea?" He says, "oh, I'd like the earlier plea." "I'm sorry, the earlier plea is gone. Do you want this plea or not." He would have taken it.

What does the knowledge of the earlier lapsed plea have to do with whether his guilty plea is knowing and voluntary? It doesn't seem to me to have anything to do with that. So I -- I thought you had some other argument that was somehow a right to profit from the earlier offer. And I find it hard to see that right, given that the prosecutor can withdraw the offer and indeed even withdraw it after it's accepted.

MR. QUEENER: The right is to enter that plea knowing the full consequences of what he's doing at that point, which includes the limitation on his exposure for the offense. This is sort of a sentencing issue. And an increase in sentence is a -- is prejudicial.

JUSTICE GINSBURG: But the -- the Missouri Supreme Court said in what -- that the prosecutor -- it

would not -- it would not order the prosecutor to renew that earlier plea. So they said the options were, you can get a new trial -- you can get a trial or you can replead the open plea. But wasn't it -- didn't the Court say we will not order the prosecutor to reinstate the earlier offer?

MR. QUEENER: That is correct, Your Honor.

Their finding more specifically I think was that they did not feel like they were empowered to do so. We certainly believe that they can -- they are empowered to do so in the sense that this is a remedy provided for a constitutional violation.

JUSTICE BREYER: What about as a constitutional violation that, in a context of a world where 95 percent of all people in prison are there as a result of bargaining and guilty pleas arranged with prosecutors, in that context, it's fundamentally unfair to deprive a person of his liberty for 40 years instead of six months because the lawyer which he is guaranteed fell down on the basic, fundamental, obvious duty of communicating the relevant plea agreement?

MR. QUEENER: I agree with you completely, Your Honor.

JUSTICE BREYER: So is there any support for me?

(Laughter.)

MR. QUEENER: That -- that is the issue where -- in terms of the sentencing outcome, this is knowledge that he is required to -- that is required by his attorney to provide him -- sentencing of difference is prejudicial under Strickland, and the remedy for -- I guess going back in -- even more basic than that -- is that ineffective assistance of counsel is -- has to be remedied.

JUSTICE SCALIA: But if that's ineffective assistance of counsel, surely it's ineffective assistance of counsel to advise him to turn down an offer that he should have snapped up. Isn't that ineffective assistance as well? If it's absolutely clear that this was a great deal, and the lawyer said, "nah, you shouldn't take it."

Is that ineffective assistance or not?

MR. QUEENER: I'm going to have to couch that in terms of saying it would depend on the circumstances -- what you have to --

JUSTICE SCALIA: I gave you the circumstances. It's clearly a super deal. Any good lawyer would have told him to take it. And this lawyer says "don't take it."

Is that ineffective assistance?

MR. QUEENER: That would probably not be ineffective assistance.

JUSTICE SCALIA: It would not be?

MR. QUEENER: The question would then be whether or not there is prejudice from that.

JUSTICE SCALIA: It would be ineffective assistance and the question would be prejudiced. Is that it?

MR. QUEENER: I think an attorney can provide reasonable representation in making that sort of an offer.

JUSTICE SCALIA: Give me -- give me a yes or no to the question whether, if every reasonable lawyer would have told him to snap up this offer but his counsel tells him, no, turn it down.

Yes or no, is that ineffective assistance?

MR. QUEENER: In that circumstance, it is ineffective assistance, because he has to do what is -- is a reasonable standard of representation.

JUSTICE SCALIA: Then we are in the soup. Then we are in the soup. Because every one of these pleas is subject to the contention that oh, there was an earlier plea, or I should have -- I should have taken it but -- I mean -- and I suppose that if he goes to trial, then you -- you would also say that trial should not

have occurred because it was the ineffective assistance of counsel that caused him to turn down the plea. And therefore, we are going to -- right, retry, set aside the trial?

MR. QUEENER: Under that circumstance, that would -- may well be.

JUSTICE SCALIA: Yes.

JUSTICE BREYER: Now, you have read these cases, and now we are right on what I think is the point, because we've both defined a possible constitutional right but there is a practical problem. All right? Now, the States and others have dealt with this on your side for the last 30 years -- and presumably you but not me. I've read a lot more cases.

Now, have they developed -- as you look across those cases, are there some States or places that have developed reasonably tough standards in respect to what counts as ineffective assistance, and in respect to whether it made a difference that would help to alleviate the concern that this would turn into a great mess? Which it hasn't, apparently.

MR. QUEENER: As I understand these cases, the -- the standards being applied are the Strickland standard. It's the high bar of deficient performance and prejudice under Strickland. And --

CHIEF JUSTICE ROBERTS: Well, we get a lot of Strickland cases, and the lower courts do, too. That's not much comfort in terms of what the consequences of a decision in your favor would be.

MR. QUEENER: I mean, that -- that's certainly true. I mean, we -- we have --

JUSTICE ALITO: Where the case goes to trial prejudice isn't going to be very hard to prove. The person turned down the 5-year deal and gets -- and after trial is sentenced to 20 years. So you've got -- you're got prejudice right there, right?

MR. QUEENER: Right.

JUSTICE ALITO: So there's always going to be a very good argument for prejudice where a person turns down a favorable deal and then gets slammed after a trial.

MR. QUEENER: I'm -- I'm going to qualify my answer a little bit. Because I think we're -- what the Court has to -- to keep in mind is the rational decision requirement that I think was reiterated in -- in Padilla. You're going to have to look at whether or not the defendant was making a rational decision -- in that choice. It's not simply that there was many another offer out there, but was the decision rational on the part of the defendant to accept or reject that offer

that was there?

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE ALITO: The point is just -- I'm sorry.

CHIEF JUSTICE ROBERTS: No, go ahead.

JUSTICE ALITO: The point is just that prejudice isn't going to be very tough to show, is it? You turned down a 1-year deal and later when that was off the table, you accepted a 5-year deal.

MR. QUEENER: That may well be the --

JUSTICE ALITO: That's prejudice.

MR. QUEENER: That may well be the easier part of the -- of the equation. But there's still going to be --

JUSTICE BREYER: Why? Because you have to show a causal connection, so you would have to show -- show in the causal connection that he would have taken that deal.

MR. QUEENER: That's -- yes.

JUSTICE BREYER: And if -- if you are going to use the words reasonable probability that he would have taken it, it might be fairly easy to show. And that's where in the back of my mind I'm thinking that maybe we want something tougher than reasonable probability, that you have to show that it really would

have made a difference.

MR. QUEENER: I -- I think reasonable probability is a -- is a workable standard that we have used for -- for many years.

JUSTICE GINSBURG: But you are -- you are leaving out of the picture the prosecutor's prerogative to withdraw or flip. You said that the court, that it lacked authority to order the State to offer any bargain, but also the court said, I'm not going to require the prosecutor to renew an earlier offer.

One thing is clear in this case; the prosecutor did nothing wrong. The wrong was on the part of defense counsel. So why should the judge disarm the prosecutor, take away the prosecutor's right to change his mind?

MR. QUEENER: The -- this is a remedy for the Sixth Amendment violation, and that is to put the defendant back into the position as nearly as possible as he would have been in at the time; and at the time the offer was open -- this is not a situation where the prosecutor is being ordered initially or the first instance to make an offer; it -- this is being viewed as the offer that was originally made is still available and open to the defendant.

JUSTICE SCALIA: Yes, but at the time that

offer could have been withdrawn by the prosecutor. And you are saying now it can't be withdrawn. So you are really not putting him back in the situation he was in.

MR. QUEENER: There -- there is never going to be a perfect remedy for any of these violations, I don't believe.

JUSTICE SCALIA: I think that's right.

MR. QUEENER: Right.

JUSTICE SCALIA: And that's one of the things that causes us to be suspicious of whether there is a constitutional violation --

MR. QUEENER: Well --

JUSTICE SCALIA: -- because there really isn't any perfect remedy.

MR. QUEENER: There can be a perfect --

JUSTICE SCALIA: In some cases not even a close to perfect remedy.

MR. QUEENER: I think this is close to perfect, as close to perfect as we can get, which is what is required for Sixth Amendment remedies, that it mitigated to the extent possible. And in those circumstances where one party, the interests of one party may be infringed upon, if that happens -- they can't be infringed upon unnecessarily. This is a necessary infringement. The State bears the burden of

ineffective assistance of counsel, and if that's in a -- an erroneous sentencing then the State has to bear the burden of erroneous sentencing.

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE ALITO: On the issue of --

CHIEF JUSTICE ROBERTS: I'll go this time. Counsel, on page 24 of your brief you quote Alford for the proposition that a valid plea must be a voluntary and intelligent choice among the alternative courses of action open to the defendant.

MR. QUEENER: Yes.

CHIEF JUSTICE ROBERTS: On the next page you say when Frye entered his guilty plea before the trial court he was completely unaware that counsel's ineffective delay had forever foreclosed those options.

Now, I put the two of those together and find you saying that this was a valid plea.

MR. QUEENER: No it was --

CHIEF JUSTICE ROBERTS: The question of validity is whether it's an intelligent choice, as you quote, among the alternative choices of action open to the defendant. The next page you say these options have forever been foreclosed, so they weren't open to the defendant.

MR. QUEENER: Well those were foreclosed

simply as a result of trial counsel's ineffectiveness, which --which caused him to be unaware that they had been ever available to him. So that that's how the plea becomes involuntary is not that he's not aware of what the situation is at the time that he's entering the plea, because there are many other circumstances that goes into his decision of whether or not to enter a plea. Those alternatives were only no longer available to him as a result of counsel's failure to perform his duty professionally and communicate the offer.

JUSTICE ALITO: On the issue of remedy, as the Respondent are you not limited to the remedies that were provided in the judgment of the State court?

MR. QUEENER: No, I don't believe so, because the State court of -- court of appeals simply thought it was not empowered to put him back in the position that he was in, and I think that is the remedy under the Sixth Amendment.

JUSTICE ALITO: You didn't file a cross petition and there wasn't one granted. So aren't -- aren't you limited to defending the judgment below? Can you ask for a modification of the judgment below in your favor?

MR. QUEENER: The second point in the -- in this case is what is the appropriate remedy.

JUSTICE GINSBURG: And that's -- is that the question that the Court raised?

MR. QUEENER: Yes, yes.

JUSTICE GINSBURG: The Court was expecting you to address.

MR. QUEENER: But we did file the petition challenging the -- the finding of the -- or the relief provided by the court below.

JUSTICE ALITO: You think that because we added a question that acts as the functional equivalent of a granted cross petition, that would permit modification of the judgment in your favor?

MR. QUEENER: No, but the last I -- the last I recall that cert petition was still pending, I may be wrong about that, I'm not sure, that it was just into this case.

JUSTICE GINSBURG: Are -- are you recognizing that the remedy that the Missouri Supreme Court did give was a futile remedy, that is, plead guilty, to have another open plea or trial, because this defendant apparently doesn't want to go to trial.

MR. QUEENER: I think both of those are futile remedies, and -- and that's why it's really obvious that the remedy has to be something else. This is not a situation where he does have a very like -- a

very good likelihood of succeeding at trial. That's not going to do any good. That won't get him a misdemeanor where he will be sentenced to 90 days. The open plea is basically the same -- the very same think that's causing him the prejudice in this case, so the remedy being provided by Missouri Court of Appeals is essentially no remedy at all for the prejudice that he suffered.

JUSTICE GINSBURG: But why should -- now that we know what the judge's sentence was, and part of the plea offer was remade, the part about -- what was it, 3 years versus 10 days in jail?

MR. QUEENER: Yes.

JUSTICE GINSBURG: And the judge said, I'm not going to give him just 10 days, I'm willing to put him in jail for the whole 3 years. Now if that -- this the sentence that the judge gave, he rejected the -- half of the plea bargain, so surely he would have rejected the more generous one.

MR. QUEENER: I -- I'm not sure that's entirely the only answer we can draw from this record. At the time that this -- or this guilty plea was being entered and the sentence was handed down, this was an open plea, it was not an agreement. If they had gone to court on a plea agreement between the prosecutor and the defense, and that was up for a -- an amendment down to a

misdemeanor and a reduced charge; you know, that is something more definitive. Then the judge would be looking at what the parties had agreed to at that point.

JUSTICE SCALIA: I'm not sure I understand the difference between an open plea and a plea agreement. He just comes to the judge and says I'm willing to plead to this without the prosecution having offered it?

MR. QUEENER: The open plea basically means there is not an agreement between the parties. Now they may each know what either party is going to argue for or recommend, but there is not an agreement between the parties.

JUSTICE SCALIA: Okay.

MR. QUEENER: And I think that -- would leave the court with a little more flexibility than -- than he might otherwise exercise if they came to him with an agreement.

JUSTICE SOTOMAYOR: I'm sorry, just to make sure. I thought the earlier, the November 15th letter agreement --

MR. QUEENER: Yes.

JUSTICE SOTOMAYOR: -- always left it up to the judge whether to accept either the felony with shock treatment or misdemeanor with 90 days. So the judge was

always free to reject either of those two?

MR. QUEENER: I think the deference to the trial court on probation was in that first one, the three years with defer to the Court on probation. If they had agreed on the 90 days in the misdemeanor, that would have been a plea agreement between the two parties. That would have been a definitive --

JUSTICE SCALIA: Well, he could still --

JUSTICE SOTOMAYOR: Binding the judge?

JUSTICE SCALIA: He could --

MR. QUEENER: Not binding the judge. No, that would not bind the judge. It never would. The judge would have the opportunity, at that point -- the only time -- the only thing the judge would have discretion over at that point would be the actual amount of sentence. If the prosecutor reduced that from a felony to a misdemeanor, the judge couldn't reject that.

JUSTICE SOTOMAYOR: He would have had to accept it.

MR. QUEENER: He would have had to accept --

JUSTICE SOTOMAYOR: But he would not have had to accept the 90 days.

MR. QUEENER: He would not have had to accept the 90 days.

JUSTICE SCALIA: But -- but you're --

JUSTICE SOTOMAYOR: I'm sorry. What proof would you have in the record that the judge would have accepted the 90 days?

MR. QUEENER: I don't have proof in the record that he would have. What I have in the record -- there is nothing in the record to suggest that that would not have happened. The appellate court found -- in fact by making the determination that Mr. Frye was prejudiced, necessarily made the conclusion that that plea would have gone forward. The motion court said nothing to refute that. There was nothing in the court's findings that the court would not have accepted that agreement had the parties come before it with that.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel. General Koster, you have two minutes remaining. General Koster.

REBUTTAL ARGUMENT OF CHRIS KOSTER

ON BEHALF OF THE PETITIONER

MR. KOSTER: Thank you, Your Honor. Two of the justices questions raise the concept of sentencing equivalency. And certainly sentencing equivalency is an important goal, both at the federal system and we've tried at the state system. But sentencing equivalency is not an avenue that the Sixth Amendment is intending

to reach. The essential question here to Justice Breyer's earlier question that I think I didn't answer properly, is should we begin unwinding these convictions in search of lost plea opportunities?

I think that we should not. It undermines the long discussions in both Hill and Premo about the importance of the finality of these, and our being able to rely on the finality of these decisions. There is mutual reliance, there's state reliance as well, because when these offers are made the state does not interview witnesses, the state does not send evidence to the lab, the state does not, you know -- sometimes even get to the point where the charges are made. So there is state reliance, which is synonymous with a reliance of justice on the finality of these agreements as well.

And also, the search for these lost opportunities that Mr. Frye is asking this court to lead us towards, takes a point of representation beyond the limited scope of the Sixth Amendment in Gonzalez v -- Gonzalez-Lopez and other courts, the limited -- the limitation of the Sixth Amendment that this Court has always appropriately articulated.

For this and other reasons stated in our briefing, the Missouri versus Court of Appeals should be reversed. Thank you.

CHIEF JUSTICE ROBERTS: Thank you counsel. The case is submitted.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was submitted.)

Q